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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CLIFFORD BERCOVICH HOWARD WEBBER Defendants.	CASE NO. CR-13-662-RS GOVERNMENT'S TRIAL MEMORANDUM

INTRODUCTION

On September 6, 2016, defendants Clifford Bercovich and Howard Webber were charged by superseding indictment with mail-wire fraud conspiracy, in violation of 18 U.S.C. § 1349; mail fraud, in violation of 18 U.S.C. § 1341; and aggravated identity theft, in violation of 18 U.S.C. § 1028A. ECF 153. The charges arise out of Bercovich and Webber's scheme to obtain the identities of, among other demographics, inmates in Wisconsin and California, and unlawfully use those identities to file fraudulent tax returns in the names of the inmates which requested refunds from the Internal Revenue Service ("IRS"). Trial is currently set for January 9, 2017.

The government submits the following trial memorandum, which sets out the law of the charged offenses, the facts the government anticipates proving, and the evidence the government intends to offer during trial.

LAW OF THE CHARGED OFFENSES

I. *Mail-wire fraud conspiracy, in violation 18 U.S.C. § 1349*

Section 1349 proscribes any attempt or conspiracy to commit mail fraud or wire fraud. 18 U.S.C. § 1349. The statute requires proof of two elements: (1) there was an agreement between the defendants to commit mail fraud or wire fraud; and (2) the defendant became a member of the conspiracy knowing of one of its objects and intending to help accomplish it. Model Crim. Jury Instr. 9th Cir. 8.20 (2010).

Unlike 18 U.S.C. § 371—the generic conspiracy statute—Section 1349 does not require the government to prove an overt act in furtherance of the conspiracy. *See United States v. Roy*, 783 F.3d 418 (2d Cir. 2015); *United States v. Rogers*, 769 F.3d 372, 380-82 (6th Cir. 2014); *United States v. Eason*, 579 F. App'x 807, 810 n.3 (11th Cir. 2014) (per curiam); *United States v. Pascacio-Rodriguez*, 749 F.3d 353, 363-64 & 364 n.49 (5th Cir. 2014); *see also Whitfield v. United States*, 543 U.S. 209, 219 (2005) (holding that where the text of a statute "does not expressly make the commission of an overt act an element of the conspiracy offense, the Government need not prove an overt act to obtain a conviction").

The agreement itself does not need to be explicit. It is "sufficient if the conspirators knew or had reason to know of the scope of the conspiracy and that their own benefits depended on the success of the venture." *United States v. Montgomery*, 384 F.3d 1050, 1062 (9th Cir. 2004). The government may rely on circumstantial evidence and inferences drawn from that evidence to prove both the existence of an agreement, *United States v. Loveland*, 825 F.3d 555, 557 (9th Cir. 2016), and the defendant's knowing connection to the conspiracy. *United States v. Johnson*, 297 F.3d 845, 868-69 (9th Cir. 2002); *United States v. Rizik*, 660 F.3d 1125, 1134 (9th Cir. 2011). Once evidence of a conspiracy is established, only a slight connection between the defendant and the conspiracy is necessary to convict the defendant of his knowing participation in the conspiracy. *United States v. Melchor-Lopez*, 627 F.2d 886, 890-91 (9th Cir. 1980); *United States v. Aichele*, 941 F.2d 761, 763 (9th Cir. 1991).

II. *Mail fraud in violation of 18 U.S.C. § 1341*

The mail fraud statute proscribes the use of an interstate mail carrier to execute a scheme to defraud; or to obtain money or property by means of a false or fraudulent pretense, representation, or promise. 18 U.S.C. § 1341. Section 1341 requires proof of four elements: (1) the defendant knowingly participated in, devised, or intended to devise a scheme or plan to defraud, or a scheme or plan to obtain money or property by means of a false or fraudulent pretense, representation, or promise; (2) the statement or omission was material; (3) the defendant acted with the intent to defraud; and (4) the defendant used, or caused to be used, an interstate mail carrier to carry out or attempt to carry out an essential part of the scheme. *United States v. Woods*, 335 F.3d 993 (9th Cir. 2003).

The mail fraud statute was intended to be construed broadly. *See United States v. Sullivan*, 522 F.3d 967, 975 (9th Cir. 2008) (noting Supreme Court's broad interpretation of fraudulent activity under mail fraud and wire fraud statutes). To that end, the Ninth Circuit has found that "individuals who retain or misappropriate the money or property of others, regardless of how they acquire it, fall within the purview of mail or wire fraud." *United States v. Jones*, 472 F.3d 1136, 1139 (9th Cir. 2007).

Materiality is an element of Section 1341. *Neder v. United States*, 527 U.S. 1 (1999). In the context of mail fraud, a statement is material if it "had a natural tendency to influence, or [was] capable of influencing, a person to part with money or property." Model Crim. Jury Instr. 9th Cir. 8.121 (2010) (citing *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir. 2008)).

The specific intent element requires proof that the scheme was "reasonably calculated to deceive persons of ordinary prudence and comprehension." However, "reckless indifferent as to [the statement's] truth or falsity" is sufficient to sustain a mail fraud conviction. *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980). A jury can infer this intent by examining the scheme itself. *United States v. Green*, 745 F.2d 1205, 1207 (9th Cir. 1984).

Mailing that is "incident to an essential part of the scheme" or "a step in the plot" satisfies the final element of Section 1341. *Schmuck v. United States*, 489 U.S. 705, 712 (1989). The defendant need not specifically intend to use the mail so long as use of the mail was reasonably foreseeable. *United States v. Hubbard*, 96 F.3d 1223, 1227-28. In fact, the defendant need not even do the mailing—the government is only required to prove that the defendant in some way caused the mailing. *United States v. Manarite*, 44, F.3d 1407, 1412-13 (9th Cir. 1995).

The mailing to the IRS of a false tax return which requests a refund constitutes mail fraud. *United States v. Kellogg*, 955 F.2d 1244 (9th Cir. 1992). However, the government does not have to prove that the IRS actually issued the refund. Under the mail fraud statute, the scheme need not actually be successful. *United States v. Utz*, 886 F.2d 1148, 1150-51 (9th Cir. 1989).

III. *Aggravated identity theft, in violation of 18 U.S.C. § 1028A*

The aggravated identity theft statute provides that whoever, during and in relation to a predicate offense, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," is guilty of a crime. 18 U.S.C. § 1028A. The statute requires proof of three elements: (1) the defendant knowingly transferred, possessed, or used without legal authority a means of identification of another person; (2) the defendant knew that the means of identification belonged to a real person; and (3) the defendant did so during and in relation to a predicate felony. Model Crim. Jury Instr. 9th Cir. 8.83 (2010).

Section 1028A(c)(5) provides that mail fraud is a predicate offense to aggravated identity theft. Further, 18 U.S.C. § 1028(d)(7) defines a "means of identification" as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any name, social security number, date of birth, official State or government issued driver's license or identification number, . . . employer or taxpayer identification number."

In *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1888-94 (2009), the Supreme Court held that Section 1028A requires the government to prove the defendant knew that the "means of identification" he unlawfully transferred, possessed, or used belonged to a real person. However, based on the Ninth Circuit's recent opinion in *United States v. Osuna-Alvarez*, 788 F.3d 1183, 1185-86 (9th Cir. 2015), whether the defendant used the means of identification with consent or knowledge of the owner is irrelevant.

STATEMENT OF FACTS

From mid-2010 to January of 2012, Bercovich and Webber conspired to obtain the identities of inmates in Wisconsin and California, and unlawfully use those identities to file false tax returns which requested refunds from the IRS.

The scheme started when Bercovich and Webber created a Limited Liability Company called Inmate Asset Liquidation and Recovery Services ("IARLS"). As part of the creation of the company, Bercovich opened several bank accounts with Wells Fargo under the name of IARLS. He also rented PO Box 603 in Kentfield, California. Bercovich used the PO Box as IARLS's mailing address. On the application for PO Box 603, Bercovich listed Webber as the only other authorized user.

Bercovich then printed "information forms" on IARLS letterhead. These forms contained fields for IARLS clients to provide their name, date of birth, and social security number. The information forms contained fields for clients to provide their wages for each year from 2008 through 2010, and the name of the person who referred the client to IARLS. Once Bercovich printed the information forms, he gave them to Webber, who was serving a term of imprisonment in the Wisconsin state prison system. Webber used the forms to solicit inmates to sign up for IARLS's services.

The purpose of these "information forms" was not to provide legal financial services for inmates. Instead, Webber used these forms to collect inmates' means of identification. In order to entice inmates, Webber promised IARLS could provide them with free government money if they filled out the form. The exact offer varied depending on who Webber was speaking to. Webber told some inmates that IARLS could help them reap the benefits of a new "Obama stimulus program." Webber told other inmates that they were owed some form of "back taxes." When inmates seemed skeptical, Webber reassured them by saying that he knew a lawyer in California who would help them through the process of getting money from the government.

On several occasions, Webber instructed inmates to write down that their wages for 2008 through 2010 were at least $7 thousand, even though the inmates had not earned such wages. Webber asserted to them that whatever their actual wages, they earned at least $7 thousand per year by operation of law. He further explained that they would never need to substantiate this income with the IRS. If an inmate was particularly reluctant to report false wages on the information form, Webber told the inmate to write down only his personal identifying information and leave the section on wages blank—Webber then took the form and wrote in false wages for the inmate.

Once Webber convinced an inmate to fill out an IARLS information form, Webber mailed the form from prison to Bercovich, who used the personal identifying information on the form to file tax returns on behalf of the inmate for 2008 through 2010. The tax returns Bercovich prepared were remarkably similar. In general, the returns reported between $6.5 thousand and $7 thousand in wages, earned income credits of $438 or $457, and making work pay credits of $400. Most importantly, all of the tax returns requested refunds. In the field of each return reserved for the taxpayer's address, Bercovich provided the address for PO Box 603.

On the 2008 and 2009 returns, Bercovich directed the IRS to send the refund checks to PO Box 603. Once the paper refund checks arrived, Bercovich forged the inmates' signatures to endorse the refunds over to himself. He then deposited the refunds into one of the IARLS bank accounts. On the 2010 returns, Bercovich reported PO Box 603 as the taxpayer's address, but directed the IRS to electronically deposit the refunds into one of IARLS's bank accounts. Once the refunds were deposited, Bercovich and Webber paid a portion over to the inmates but kept the balance of the proceeds for themselves.

Bercovich and Webber caused a substantial loss to the federal government: hundreds of nearly identical, false returns reported PO Box 603 as the taxpayer's address. Each of these returns requested a refund.

ANTICIPATED EVIDENCE

The government's case against Bercovich and Webber consists of testimony of IARLS inmate victims and recruiters from Wisconsin and California; an expert in tax computation, accounting, and the Internal Revenue Code ("IRC"); an expert in forensic computer investigations; the agents who interviewed Bercovich and Webber; custodians of record who may authenticate and lay the foundation for government records, bank records, postal records, records of incarceration, and records of inmate financial accounts; jailhouse phone calls between Webber and Bercovich; and evidence found during the execution of the search warrant on Bercovich's residence. Considering the volume of the government's evidence, the government further intends to offer charts to summarize records which the jury cannot easily examine in court.

I. *Inmate victims and recruiters*

The IARLS clients and recruiters—who were incarcerated in the California and Wisconsin state prison systems—may testify regarding their interactions with Webber and Bercovich; how they met Webber or Bercovich; Webber's explanation of IARLS's services; Webber's pitch to solicit IARLS clients and recruiters; what was written on their information forms; whether they were incarcerated from 2008 through 2010, and if not, the income they earned in those years; the accuracy of the tax returns filed in their names; whether they gave Bercovich permission to deposit refund checks issued in their names or use their signatures; and how they were compensated as clients or recruiters.

II. *Tax computation and accounting expert*

IRS Special Enforcement Program and Revenue Agent James Oertel is an expert in tax computation, accounting, and the IRC. Agent Oertel may provide the corrected tax computations for a subset of IARLS's clients; and testify regarding who is entitled to report certain wages, credits, and refunds. Agent Oertel's expert report compares the information reported on a subset of IARLS tax returns to taxpayer information which was recorded on the IRS's Information Reporting Program.[1] Applying the IRC to the information which was independently reported to the IRS, Agent Oertel determined the corrected income, wages, credits, and refunds or liabilities for each of the IARLS clients he audited. Agent Oertel then determined the variances between the IARLS refunds and the refunds to which the inmates were actually entitled.[2]

III. *Forensic computer investigations expert*

During the execution of a federal search warrant on Bercovich's residence, agents seized a computer and a cellular phone. When agents searched the computer, they discovered copies of electronic tax returns which related to Bercovich and Webber's scheme; ledgers tracking tax returns Bercovich prepared, treasury checks IARLS received, and payments to inmates; power of attorney forms which purporting to give Bercovich the authority to cash clients' checks[3]; and different versions of IARLS promotional materials which purported to explain the company's services. On the cellular phone, agents discovered incriminating text message conversations involving Bercovich.

IRS Computer Investigations Specialist and Special Agent Jeffrey Jack is an expert in forensic computer investigations. Special Agent Jack may testify to the computer imaging process; the process of extracting data from the phone; and the forensic analysis of the electronic devices. Special Agent Jack may further authenticate these files through a hash value comparison of the government's exhibits to the files extracted from the electronic devices; and testify regarding the files' pathways, when the files were created, when the files were last altered, and other information pertaining to the creation and modification of the files found on the electronic devices.

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[1] The Information Reporting Program is the IRS database which keeps track of income and withholdings which are independently reported to the IRS (e.g., wages and withholdings reported on Forms W-2, 1099, etc.).

[2] Agent Oertel's report notes the limitations to his analysis, including the fact that not all income is independently reported to the IRS.

[3] The government anticipates offering evidence that Bercovich was disbarred long before executing the power of attorney forms with IARLS clients.

IV. *Agents who interviewed Bercovich and Webber*

IRS Special Agents Steve Martins and Adam Grey separately interviewed Bercovich and Webber. Special Agents Martins and Grey may testify to the circumstances of the interviews; the statements that Bercovich and Webber gave; and other information pertinent to those statements, i.e., Bercovich and Webber's demeanors during the interviews. Special Agents Martins and Grey may testify that Bercovich and Webber both admitted to their involvement in IARLS and to facilitating the filing of tax returns.[4]

V. *Custodians of record*

The government intends to offer IARLS's Wells Fargo Bank records; the United States Postal Service application for PO Box 603; Bercovich's California State Bar profile; IRS records, including certified tax returns and treasury checks; records of when inmates were incarcerated in Wisconsin; and records of inmate financial accounts.[5]

Bank records show that Bercovich primarily used three Wells Fargo Bank accounts to operate IARLS, receive electronic tax refunds, and deposit physical treasury checks. Those bank accounts were opened in the name of IARLS, and were often used to remit payments on Webber's behalf. Similarly, PO Box 603 was listed as the taxpayer's address on hundreds of tax returns. The application to PO Box 603 shows that Bercovich rented the postal box and listed Webber as the only other authorized user.

With regard to IRS records, the government has had approximately 700 IARLS tax returns certified. Those tax returns list PO Box 603 as the taxpayer's address; are for tax years between 2008 and 2010; report wages of between $6.5 thousand and $7 thousand; often request direct deposit of the tax refund into an IARLS bank account; and report nearly identical credits and refund amounts. Images of the treasury checks show that the inmates' signatures were forged to sign the treasury checks over to IARLS before they were deposited into an IARLS bank account.

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[4] Both Bercovich and Webber implicated the other during their interviews. To avoid any confrontation issues, the government will prepare these agents to testify to the statements in a way which comports with the requirements of *Bruton v. United States*, 391 U.S. 123 (1968).

[5] The majority of these records can be introduced with certifications that meet the requirements of Federal Rule of Evidence 902(11). The government hopes to reach stipulations regarding the admissibility of the remaining evidence for which the government has not obtained a Rule 902(11) certification.

Finally, records of incarceration show that many of the clients for whom Bercovich and Webber filed 2008 through 2010 returns were in Wisconsin state prison while they were ostensibly earning income. Records of those inmates' prison financial accounts suggest that Bercovich was paying inmate clients and recruiters who had signed on with IARLS.

VI. *Jailhouse phone calls*

While Webber was detained in the Milwaukee Secure Detention Facility ("MSDF"), prison officials recorded Webber's phone calls. Those recordings capture Bercovich and Webber actively discussing their scheme. Bercovich and Webber discuss inmates they had recently signed up, IARLS recruiters, frustrations they encountered while carrying out the scheme, and expanding the enterprise once Webber was released from custody. In a number of phone calls, Webber tells Bercovich to send more IARLS information forms to MSDF, opines that it would be better to stop using Mayra Parl's tax preparation software, tells Bercovich that he knows someone who will be able to recruit homeless clients, and solicits Bercovich to pay IARLS clients and recruiters who are incarcerated in California and Wisconsin. Meanwhile, Bercovich routinely updates Webber on the number of returns he filed, the checks he received, and the inmates he paid.

VII. *Search warrant evidence*

During the execution of the search warrant on Bercovich's residence, agents discovered hundreds of IARLS agreements and information forms; IARLS promotional material; fraudulent treasury checks; handwritten notes related to IARLS clients and recruiters; IRS correspondences to "taxpayers" who were incarcerated in Wisconsin and California; letters from Webber and other IARLS clients and recruiters; printed incarceration records for IARLS clients in Wisconsin; money orders in envelopes addressed to inmates; and draft tax returns for IARLS clients.

VIII. *Rule 1006 charts summarizing voluminous evidence*

Federal Rule of Evidence 1006 provides for the introduction of exhibits which summarize voluminous, admissible evidence that the jury cannot easily examine in court. *United States v. Johnson*, 594 F.2d 1253, 1256-57 (9th Cir. 1979). Rule 1006 only requires that the underlying documents be admissible—the proponent need not actually offer the documents which were used to create the summary exhibit. *Johnson*, 594 F.2d at 1257 n.5; *United States v. Shirley*, 884 F.2d 1130, 1133 (9th Cir. 1989); *United States v. Meyers*, 847 F.2d 1408, 1411 (9th Cir. 1988).

The government intends to introduce charts which summarize certain categories of voluminous evidence. In particular, the government intends to offer charts summarizing the information reported on IARLS tax returns which list PO Box 603 as the taxpayer address; records from three IARLS Wells Fargo Bank accounts; information forms discovered in Bercovich's residence during the execution of the search warrant; treasury checks deposited into IARLS bank accounts; and electronic tax returns discovered on Bercovich's computer.

CONCLUSION

There is sufficient evidence to prove beyond a reasonable doubt that Howard Webber and Clifford Bercovich are guilty of the crimes charged in the superseding indictment.

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CERTIFICATE OF SERVICE

I hereby certify that December 8, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notice of electronic filing to counsel of record in this case.

/s/ Gregory Bernstein
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